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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASHTON A. BEADLE,

Petitioner,

—v.—

CITY OF TAMPA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR CERTIORARI

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1995

No. 94-1075

In The Supreme Court of the United States

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ASHTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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1. The American Jewish Congress and the Christian Legal Society respectfully seek leave to file the attached brief *amici curiae* in support of Petitioners.

2. The Petitioners consented to the filing of this brief; Respondents did not.

3. Both *amici* routinely represent individuals complaining of religious discrimination in employment. The outcome of this case is thus important to their ongoing work.

4. For these reasons, the two organizations respectfully request permission to file the attached brief.

Marc D. Stern

May 18, 1995

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INTEREST OF THE *AMICI*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has taken a particular interest in the religious liberty provisions of Title VII, believing that religious accommodation must be given a broad and generous reading in order to protect religious believers.

* * *

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has adovcated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations shince 1980.

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious freedom.

ARGUMENT

Title VII requires that employee religious practice be accommodated unless doing so imposes an "undue hardship", 42 U.S.C. § 2000e(j). In *T.W.A, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court construed undue hardship as anything more than a *de minimis* hardship. This case presents the question of whether even that burden is satisfied by an employer who does absolutely nothing to accommodate the employee, 42 F.3d at 637, despite the availability of an alternative which was not shown to impose any costs on the employer, much less an undue burden. As a subsidiary question, it presents the question of whether accommodation in "public safety positions" imposes "undue hardship" as a matter of law without regard to whether in fact the accommodation results in any measurable loss of efficiency in the provision of these services.

One would have thought that the answer to both of these questions is no. Surely, the uninformed person reading the statute would think so, as would the reader of judicial decisions from around the country. But in the Eleventh Circuit, the answer is different. There, the answer to both questions is yes. This Court should grant a writ of certiorari to restore unity to the caselaw and meaning to the statute.

I. No Burden Is Not An "Undue Hardship"

Petitioner Beadle graduated from Tampa's police academy and was assigned to its follow-up training program. The schedule for trainees was the same as for the Department generally–the so-called "neutral rotating shift." 42 F.3d at 635. The shift's neutrality lies exclusively in the fact that it is equally indifferent to all employees' religious practices. Tampa, indeed, is ruthless in its neutrality. It does not allow employees to 'swap' shifts with fellow employees in order to ameliorate the harsh effects of its neutral policy or to depart in any other way from its established shifts. 42 F.3d at 637.

The Eleventh Circuit found that this scheme discharged Tampa's duty to accommodate, citing *Hardison*, 432 U.S. at 80-81. Since, as Judge Posner has put it (albeit in the context of the Americans With Disabilities Act), the duty to accommodate means that the "employer must be willing to consider changes in its ordinary work rules . . . ." *Van de Zande v. Wisconsin*, 44 F.3d 538, 542 (7th Cir. 1995), this result cannot be based on the rule of *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60 (1986), that any accommodation which removes the conflict between faith and productive employment satisfies the statutory duty. Nothing Tampa has done remotely approaches meeting this standard. The Court below implicitly acknowledged this and accordingly rested on a finding that accommodating Beadle would produce undue hardship. 42 F.3d at 637.

The Court of Appeals began its discussion of undue hardship by quoting a passage of *Hardison* suggesting that by allowing a mandatory preferential escape from a seniority system for employees with religious needs, an employer would create problems of morale and fairness for its work force. In its original context this paragraph addresses the definition of what is an accommodation, not the undue burden question the Eleventh Circuit said it was addressing.

The Eleventh Circuit must, then, have read this passage to mean that any departure from a neutral rotating shift always creates undue hardship as a matter of law. The vice in the argument is that it would mean that every employer would establish an inflexible "neutral rotating schedule" and claim undue hardship in order to avoid accommodating employee religious practices.

This reading necessarily eviscerates a statute whose enforcement has lead to gainful employment for millions of Americans who observe religious calendars different than the prevailing norm. And it assumes that American workers are uniformly hostile and unsympathetic to the religious needs of their co-workers. In fact, the practical experience of the organizations signing this brief–as well as the case law–indicates otherwise.

In *Hardison*, moreover, the employer did not insist on its schedule and no other, as Tampa does. T.W.A. was prepared to accept whatever swaps Hardison and the union would agree to. Tampa is not so flexible. Its police must eschew any and all time-bound religious prohibitions

on gainful employment. Its trainees must be trained only as Tampa arbitrarily dictates, and no other way.

The Eleventh Circuit's misapprehension of *Hardison* suggests that without any proof that swaps or other scheduling changes would constitute undue (or any) hardship,[1] a rotating neutral shift satisfies the statute. As we have shown, *Hardison* itself held no such thing. Any fair reading of the case demonstrates that the availability of swaps and proof that Hardison's proffered accommodation was untenable was essential to its holding. Invoking that decision after undermining its foundations is not an acceptable application of *stare decises*.

The religious accommodation provision of Title VII means at least that religious practice has some weight in the balance, that its presence requires some individualized consideration, that employers cannot simply hide behind a veil of ostensible neutrality when confronted with an employee whose religion dictates a departure from the ordinary norms of the workplace. So much is apparent from the face of the statute.

The suggestion of the Court below (and of the Respondents) that departure from a system of absolute and unbending indifference constitutes undue hardship

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1. In the present posture of this case, it is not necessary to pass on a question which has divided the Courts of Appeal, namely whether the employer may delegate all responsibility for finding an accommodation to the employee, or whether the employer must aid in this search.

cannot be reconciled with the plain language and purpose of Title VII's religious accommodation provision.

The Eleventh Circuit's holding that departure from a neutral rotating shift is as a matter of law undue hardship would render Title VII's protections wholly nugatory in regard to the observance of religious holidays and the Sabbath. Although the legislative history of the religious accommodation provision is sparse, what there is demonstrates that it was introduced and adopted precisely to ameliorate such conflicts, and to lessen the financial pressures on Sabbatarians to abandon their faith as a price of holding gainful employment. 118 Cong. Rec. at 706 (1972) (remarks of Senator Randolph).

Under the Eleventh Circuit's construction, by contrast, 2000e(j) might retain vitality in other religious conflicts, say dress codes, but not in regard to scheduling clashes which give rise to the statute in the first place. Its construction of the statute therefore cannot stand.

II. There Is No Blanket Safety Exemption From the Duty to Accommodate

As an alternative ground for its holding, the appeals court effectively held that "public safety employers" are exempt from Title VII's duty to accommodate. 42 F.3d at 637. Beadle conceded that accommodating him would have meant that he would have not "experienced the educational benefits of working with differing training officers." *Id.* He argued however that this change would not have significantly affected his training. The Court

held it would not second guess Tampa's insistence on its training program.

In an attached footnote, and without further explanation, the Court brushed aside as "irrelevant" Beadle's evidence that those parts of the training that he missed were not crucial, as demonstrated by the fact that they were eliminated shortly after he passed through the program. Before addressing the broader holding with regard to public safety employees and religious accommodation, we address this evidentiary holding.

The Federal Rules of Evidence (R. 401) define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable . . . than it would be without the evidence."

Unless as a matter of law no policeman can ever invoke 2000e(j) with regard to scheduling conflicts, the validity of Tampa's undue hardship claim turned on whether Beadle would be a less competent police officer for not having two training officers. Surely, the trier of fact might reach a different conclusion on this question if he or she knew that shortly after Beadle passed through the system, this part of the training program was eliminated. Presumably, Tampa is not turning out less competent police under this new system than under its prior system. How, then, could it be irrelevant that Tampa no longer insists on the very training it insisted that Beadle take, and without which it says he could not function effectively as a police officer?

But even on its own terms, the Eleventh Circuit's treatment of this issue is no more satisfying. *In toto* that court held:

> We agree with the magistrate court's refusal to interfere with the Department's scheduling and training programs. When the employer's business involves the protection of lives and property, "courts would go slow in restructuring [its] employment practices." *Albuquerque*, 545 F.2d at 114.

This sort of judicial self-abnegation has not been applied in any other area of Title VII. Courts have reviewed–and invalidated– police examinations, promotional policies, height and weight requirements, and elements of training programs. They have likewise rejected other challenges to employment practices on the merits, not by adopting the Eleventh Circuit's blind and non-reflexive deference to inflexible procedures, but by applying ordinary Title VII standards of proof that these practices cannot be abandoned or modified without creating undue hardship.

Thus, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court invalidated height and weight requirements for correction guards, but upheld on peculiar facts proved by the state of Alabama–that its prisons were characterized by 'rampant violence' and a 'jungle atmosphere', *id.* at 334–an exclusion of women guards from certain prison jobs. Nowhere in the opinion is there any suggestion that

the judgments of prison officials are entitled to deference, a concept not unknown to this Court.

The lower federal courts have also passed on a wide variety of discrimination claims in hiring, firing, promoting and training public safety officers. In some of these cases plaintiffs prevailed and in others defendants did, but the courts apply standard Title VII principles without the formless, evidenceless deference practiced here by the Eleventh Circuit. See, *e.g.*, *Blanding v. Pennsylvania State Police*, 12 F.3d 1303 (3rd Cir. 1993) (police; discharge); *Sorenson v. City of Aurora*, 984 F.2d 349 (10th Cir. 1993) (fire department discharge); *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991) (fireman; discharge); *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985) (police; hiring criteria); *United States v. Commonwealth of Virginia*, 620 F.2d 1018 (4th Cir. 1980) (police; hiring criteria); *Guardians Assoc. v. Civil Svc. Comm'n*, 633 F.2d 232 (2d Cir. 1980) (same).

We do not suggest that the special nature of public safety employment in general or police work in particular is irrelevant in the adjudication of these cases. *Cf. Davis v. City of Dallas, supra*. Plainly it is relevant. We contend only that the Court below erred in allowing the bare fact that this case involves police employment to mechanically dictate the result.[2]

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2. The Tenth Circuit in *U.S. v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976) did in fact write that courts should go slow in restricting the

(continued...)

Congress knows how to exempt public safety officers from civil rights and other labor laws. See 29 U.S.C. § 623(j) (age discrimination); 29 U.S.C. § 213(b)(20) (overtime pay). It did not do so with regard to religious accommodation. The Eleventh Circuit should not have created such an exemption by judicial fiat.

CONCLUSION

This Court has twice passed on the interpretation of Title VII's religious accommodation provisions. Each time this Court offered a narrow reading of those guarantees. We believe the decision below is incompatible with those narrow constructions of the Act. But there is a broader reason to review the judgement below. The Eleventh Circuit has apparently taken these narrow readings as a signal that these provisions are not to be applied with the

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2.(...continued)

practices of employees charged with protecting the life and property of citizens. The Eleventh Circuit erroneously thought that decision established a rule of law. The Tenth Circuit, however, did not treat this understandable caution as tantamount to a rule of law. That Court instead reviewed the detailed findings of the trial court finding that an accommodation of a Sabbatarian firefighter plaintiff was impossible. Those findings did not turn on any notion of deference

same rigor as the rest of Title VII. The Court should take this case to clarify its understanding of this important provision of the nation's civil rights laws.

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